Supreme Court of the United States

OCTOBER TERM, 1940.

No. 148

LUCIEN H. TYNG,

Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WAYNE JOHNSON on behalf of Lucien H. Tyng prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on March 13th, 1940, denying petitioner's application to said court to affirm the decision of the Board of Tax Appeals herein, or alternatively to remand the entire proceeding to the Board of Tax Appeals for reconsideration.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 28-54) is reported in 36 B.T.A. 21. The opinion of the Circuit Court of Appeals (R. 391-401) is reported in 106 Fed. 2nd 55. The opinion of the Supreme Court (R. 402) is reported in

308 U. S. 527. The opinion on remand of the Circuit Court of Appeals for the Second Circuit dated April 4th, 1940 (R. 405) is not officially reported.

Jurisdiction.

The order of the Circuit Court of Appeals was entered March 13th, 1940. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Questions Presented.

Whether the remand by the Supreme Court of the United States was a final disposition of this case on the merits.

Whether the exchange of stock, convertible debentures, gold debenture bonds, and convertible investment certificates of the Associated Gas & Electric Company and cash for stock interests, direct and indirect, of the General Gas & Electric System, which resulted in the acquisition of the General Gas & Electric System by the Associated Gas and Electric System constituted a reorganization within the meaning of Section 112 (i) (1) of the Revenue Act of 1928 and whether petitioner who received stock, convertible debentures, and gold debenture bonds of Associated Gas and Electric Company plus cash for his interests, direct and indirect, in General Gas and Electric System should be taxed on the receipt of the gold debenture bonds and convertible debentures under the reorganization provisions of Sec. 112 of the Revenue Act of 1928.

Whether the entire proceeding should be remanded to the Board of Tax Appeals for further proceedings.

Statute Involved.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * * *

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition

by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of reorganization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

REVENUE ACT OF 1926.

SEC. 1003 (a). The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

SEC. 1003 (b). Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

Statement.

The facts pertaining to the issues originally involved were stipulated (R. 101-155) and were found by the Board of Tax Appeals (R. 30-48). The facts herein involved are substantially as follows:

In 1929 Associated Gas & Electric Company (hereinafter called Associated) was seeking control of the General Gas & Electric Corporation (hereinafter called General Gas) (R. 32). W. S. Barstow & Company, a Delaware corporation (hereinafter called Barstow), owned about 55½% of the voting stock of General Gas (R. 32) and Barstow Securities Corporation (hereinafter called Barstow Securities) owned a large percentage of the stock of Barstow (R. 31-32). Barstow Securities stock in turn was owned by petitioner and his associates (R. 31). Petitioner desired to have an investment in securities of public utilities (R. 151).

Associated made a public offer to exchange its stock for stock of General Gas (R. 153, 368-370). As part of the acquisition of General Gas, a plan was set forth in a written agreement (Ex. 13, R. 298-305) under which Associated received the majority of the voting stock of the General Gas & Electric System from the Barstow holdings in exchange for convertible debentures, debenture bonds, convertible investment certificates and cash.

The convertible debentures, at the option of the registered owners, were convertible into Class A *common stock* of the Associated (R. 330, Ex. 16). The investment certificates, at the option of the company, were convertible into *Preferred stock* of the Associated (R. 345, Ex. 18). Associated publicly offered to acquire the remaining common stock other than that owned by Barstow interests by

exchanging Associated stock for the "A" and "B" common stock of General Gas (R. 153, 368-370). Petitioner exchanged 5149.54 shares of Class B stock of General Gas for 7724.31 shares of Class A stock of Associated (R. 12, 413) and the stock exchange was handled under the same escrow agreements as the exchange for Barstow stock (R. 413).

The agreement between the parties further provided for the acquisition by Associated of all the Preferred stock of Barstow and Associated actually acquired most of those shares (R. 34).

The commissioner treated the Barstow phase of the transaction as a sale to Associated and in computing petitioner's 1929 income tax included the value of the Associated obligations he received by reason thereof as taxable gain, whereas petitioner contended that securities were obtained under a reorganization within the meaning of Section 112 (i) (1) of the Revenue Act of 1928 and that they were exempt under Section 112 (b) (3) and 112 (c) (1) of said Act.

The Board of Tax Appeals, considering this case with the companion case of *Buchsbaum* v. *Commissioner*, ruled in favor of petitioner, holding that the acquisition by Associated of the stock of Barstow Securities and Barstow in exchange for securities and cash of Associated constituted a reorganization and an exchange of securities which was a tax free transaction (R. 28-54. Reported 36 B. T. A. 21).

The Circuit Court of Appeals for the Second Circuit, considering the two companion cases, likewise held that the transaction was a reorganization and that petitioner received securities in a tax free transaction and that no taxable gain was derived by petitioner (R. 391-401. Reported 106 Fed. 2nd 55).

The Commissioner petitioned the Supreme Court of the United States in both cases for a writ of certiorari and the Supreme Court granted the writs and at the same time reversed the judgments and "remanded to the Circuit Court of Appeals for further proceedings. *LeTulle* v. *Scofield No. 63* this day decided." (R. 402. Reported 308 U. S. 527). Petition for rehearing was denied.

On remand to the Circuit Court of Appeals for the Second Circuit, petitioner moved the Court to affirm the decision of the Board of Tax Appeals under the law as enunciated in *LeTulle* v. *Scofield*, 308 U. S. 415, or alternatively to have the case remanded to the United States Board of Tax Appeals for further consideration. This motion was denied and an order entered March 13th, 1940. (R. 417). Under date of April 4th, 1940, the Circuit Court of Appeals for the Second Circuit handed down a memorandum (R. 405. Not officially reported), in effect holding that they were precluded from granting petitioner any further relief in view of the decision of the Supreme Court.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that they were precluded by the reversal of the Supreme Court from granting petitioner any further relief.

2. In holding that the petitioner derived a taxable gain from the receipt of Associated debentures.

3. In holding that the case should not be remanded to the Board of Tax Appeals for further consideration.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has misconstrued the *per curiam* opinion of the Supreme Court in this case as precluding any further relief to the petitioner and should have reconsidered this case on its merits under the law as set forth in the *LeTulle* opinion, especially in view of the fact that the petitioner was not afforded an opportunity to be heard.

2. The decision of the Circuit Court of Appeals on the remand is in conflict with the law enunciated in the *LeTulle* case, in *Helvering* v. *Watts*, 296 U. S. 387 and in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378. The petitioner in 1929 in consideration for his stock interest, direct and indirect, in General Gas received the following securities of Associated: 7,724.31 shares of Class A stock, 3,325 of 4½% Convertible Debentures due 1949 at 93 with accrued interest, 3,100 of 5% Gold Debenture Bonds of 1968 at 90 with accrued interest and $4,233,231.97 in cash. Of course the cash was returned as income and the tax paid thereon. The *LeTulle* decision reads in part

> "Where the consideration is wholly in transferee's bonds, or part cash and part such bonds, we think it cannot be said that the transferor retained any proprietary interest in the enterprise."

The petitioner here intended to retain a proprietary interest in the enterprise (R. 151, 412) and received 7724.31 shares of Associated stock together with 3,325 convertible debentures which are more in the nature of stock than bonds and which were convertible into stock, together with gold debenture bonds and cash. We believe that petitioner clearly retained a proprietary interest in the enterprise, a sub-

stantial stake in the enterprise and received a large or substantial proportion of stock within the language of the *LeTulle* decision. While the petitioner receives some cash, the language of the *LeTulle* decision reading,

> "We have said that the statute was not satisfied unless the transferor retained a substantial stake in the enterprise and such a stake was thought to be retained where a large proportion of the consideration was in common stock of the transferee, or where the transferor took cash and the entire issue of preferred stock of the transferee corporation. And, where the consideration is represented by a substantial proportion of stock, and the balance in bonds, the total consideration received is exempt from tax under Sec. 112 (b) (4) and 112 (g)."

would seem to apply and support the conclusion that petitioner's securities were exempt from tax. The tax exempt situations in the *LeTulle* decision are analogous to the case at bar, whereas the *LeTulle* facts are not. (See also, *Helvering* v. *Watts* and *Helvering* v. *Minnesota Tea Co.*). While the record shows how much stock petitioner exchanged for Associated stock, the total stock exchanged does not fully appear. It appears that the Barstow holdings comprised a majority of the "B" common and that the Associated offered and undoubtedly acquired the rest of the "B" and the "A" common of General Gas in exchange for its own stock.

When the Board of Tax Appeals and the Circuit Court of Appeals originally decided this case in favor of petitioner they merely considered the evidence in respect to the Barstow holdings, although the record clearly evidenced that there was one huge transaction whereby the Associated System acquired control over the General Gas & Electric System. The record evidences that the Barstow

transaction was merely part of this plan and that in the entire transaction the petitioner did obtain 7724.31 shares of stock of the Associated. When the Board and the Circuit Court failed to comment on these facts relying solely upon that portion of the transaction which involved the Barstow holdings it was not the province of the petitioner, in whose favor they decided, to object. However, in considering the application of the *LeTulle* decision, the petitioner, who was not heard in the Supreme Court, should have been permitted to rely upon these facts in the record before the Circuit Court. These facts, in addition to the facts originally considered by the Circuit Court, if not the original facts alone, required that the Circuit Court affirm the original conclusion of the Board of Tax Appeals under Sec. 1003 (b) of the Revenue Act of 1926 which expressly authorizes it to affirm or to modify or reverse the decision "with or without remanding the case for a rehearing, as justice may require" if the Board's decision is not in accordance with law.

3. The Circuit Court should have remanded this case to the Board of Tax Appeals for further determination or proceedings. As previously stated, the record in this case shows that the Barstow transfers were but part of a larger transaction whereby the Associated System acquired control of the General Gas & Electric System and the petitioner exchanged some stock for stock. He should not be subjected to the serious consequences of being practically wiped out some ten years after the transaction because the Board chose to decide the case without considering the entire transaction. While it might now be said that the whole transaction and all its phases should have been stressed, it was not until the *LeTulle* decision that the necessity for considering the broader aspects of the case

became apparent. Originally counsel for the Government and the taxpayer considered the issue to be only whether or not debentures constituted securities.

While the record shows that Associated acquired stock of General Gas for its own stock, it does not appear just how much stock was exchanged in kind. Evidence of this and other essential facts, might be necessary in order to determine the application of the *LeTulle* decision, although it is contended that there are already sufficient facts in the record to support petitioner's position under the *LeTulle* decision. The court should consider and the petitioner should be permitted to argue all the facts and the merits.

It further appears that the sale of the debentures by Petitioner was restricted (R. 315) and would therefore have no ascertainable market value, *Helvering* v. *Tex-Penn Oil Co.* 300 U. S. 481, 499, and it could also appear that Petitioner realized no gain because of a drop in value. This has been fully developed in the companion case of *Buchsbaum* vs. *Helvering,* and we respectfully refer this court to that case, where the record in this respect before the Circuit Court of Appeals on remand was more fully developed, as was argument of counsel, and ask this court to consider said record and petition as if incorporated herein. In the original decision of the Board of Tax Appeals, and the original opinion of the Circuit Court of Appeals, both deciding the issue in favor of Petitioner, consideration of these questions were unnecessary. But in the event that there was not a reorganization, justice will be frustrated if this petitioner is taxed when there has been no ascertainable gain. Petitioner should be afforded an opportunity further to develop this and would appear to come squarely within the language of *Virginia-Lincoln Furniture Corpn.* v. *Commissioner,* 56 Fed. (2d) 1028, (C. C. A. 4th, 1932) at page 1033:

"* * * we will not turn him (the taxpayer) out of court because he may have misconceived his remedy. As we have said before, courts exist to do justice, not to furnish a forum for the technical skill of counsel. In reviewing a decision of the Board, we are given broad powers to affirm, modify, or reverse it 'as justice may require' * * *; and we do not think that justice requires that a petitioner with a meritorious case be turned out of court upon any such technical ground."

Conclusion.

It is therefore respectfully submitted that this petition for writ of certiorari should be granted, and this court should review and finally reverse the order and decision of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

WAYNE JOHNSON,
Counsel for Lucien H. Tyng, Petitioner.

June 11, 1940.

No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1940

LUCIEN H. TYNG, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 28–54) is reported in 36 B. T. A. 21; the original opinion of the Circuit Court of Appeals (R. 391–401) is reported in 106 F. (2d) 55, and the opinion of this Court (R. 402) is reported in 308 U. S. 527. The opinion of the Circuit Court of Appeals, on remand (R. 405), is not reported.

JURISDICTION

The order of the Circuit Court of Appeals was entered March 13, 1940. (R. 417.) The petition

for a writ of certiorari was filed June 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals have the power again to affirm the decision of the Board of Tax Appeals after this Court had reversed its original judgment of affirmance?

2. Alternatively, whether, despite such reversal, the Circuit Court of Appeals should have remanded the cause to the Board to redetermine the issue in the light of alleged additional facts which could have been but were not presented to it in the first instance.

3. Whether, in any event, such facts justify the relief sought.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
>
> * * * * *
>
> (i) *Definition of reorganization.*—As used in this section and sections 113 and 115—
>
> (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the proper-

ties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * *

STATEMENT

The facts are fully stated in the petition for writs of certiorari filed by the Government in the cases of *Guy T. Helvering, Commissioner of Internal Revenue* v. *Lucien H. Tyng,* and *Guy T. Helvering, Commissioner of Internal Revenue* v. *William Buchsbaum,* Nos. 537 and 538, October Term, 1939 (pp. 4–8), reference to which is hereby made. Only a brief summary of them is necessary here.

Barstow Securities Corporation owned all of the stock of W. S. Barstow & Company, which in turn owned 55½% of the voting stock of General Gas & Electric Corporation. On February 5, 1929, all of the stockholders of Barstow Securities Corporation, including petitioner, entered into an agreement for the sale of the stock of these corporations to Associated Gas & Electric Company (hereinafter referred to as Associated) for $50,000,000 in cash (R. 32, 104–105, 134, 260).

On February 11, 1929, a supplementary agreement was entered into under the terms of which

the transferors received instead, $34,699,528.54 in cash and $15,208,021.60 (including interest) in unsecured convertible gold debentures, gold debenture bonds and convertible investment certificates issued by Associated (R. 135, 138–139). One of the reasons for receiving payment in part in such obligations was the desire on the part of the petitioner and two other individual Barstow stockholders to minimize income taxes (R. 32, 146, 151–152).

On the theory that the transaction was a sale and not a reorganization within the meaning of Section 112 (i) (1) of the Revenue Act of 1928, the Commissioner included the value of the obligations of Associated received by the petitioner in his gross income for 1929 (R. 20), and as a result of this, as well as certain other adjustments not material here, determined the deficiency here in question (R. 19). The Board of Tax Appeals held that the transaction constituted a reorganization within the meaning of that section (R. 39), and accordingly reduced such deficiency to $157,223.92 (R. 74). The United States Circuit Court of Appeals for the Second Circuit affirmed the Board's decision on this issue (R. 397). This Court reversed the decision of the lower court on the authority of *Le Tulle* v. *Scofield,* 308 U. S. 415, decided the same day, January 2, 1940 (R. 402). The petitioner thereupon filed a petition for a re-

hearing which was denied on January 29, 1940.[1] The basis of the petition for rehearing was the assertion that he had accepted an offer of Associated to exchange the stock he personally held in General Gas & Electric Corporation for stock of Associated, thus acquiring a substantial amount of Associated stock "as a part of the transaction in question," with the result that he had brought himself within the principle laid down in the *Le Tulle* case. (Pet. Rehearing 2–3.)

Despite this Court's reversal of the judgment below and despite the denial of the petition for rehearing, the petitioner moved the lower court (R. 406–407) again to affirm the Board's decision on this question or, alternatively, to—

> remand the case to the U. S. Board of Tax Appeals, with instructions to find the facts in connection with the determination whether Tyng had a stage [sic] in the enterprise through the exchange of stock of the General Gas & Electric Corp. for stock of the Associated Gas & Electric Corp., and convertible debentures, so as to constitute a tax-free transaction,

and also to determine whether or not the debentures had an ascertainable market value when received by the petitioner in 1929.

The petitioner supported this motion by an affidavit of his attorney, Wayne Johnson, in which

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[1] Neither the filing of this petition nor its denial is noted in the record.

it is asserted that he had "retained 7700 shares of common stock" (of Associated) and that the convertible debentures which he had received were substantially equivalent to preferred stock (R. 409). He also filed an affidavit of one William W. Hoppin to the effect that as "a part of the plan of reorganization whereby the Associated Gas & Electric system acquired the General Gas & Electric System," Associated made an offer to acquire all stock of General Gas & Electric Corporation and that "This part of the exchange resulted in Mr. Tyng obtaining 7724.31 shares of Associated Gas & Electric Company Class A Stock for 5149.54 shares of General Gas & Electric Corporation Class B Stock" (R. 413). As disclosed by Wayne Johnson's affidavit, the theory of the petitioner's motion was that, when this Court remanded the case on the basis of the *Le Tulle* decision, it intended the court below to ascertain whether the *Tyng* case was governed by that decision (R. 407–408). The affiant therefore urged that in the light of the newly alleged facts, the decision of the Board herein was not inconsistent with the *Le Tulle* case and should therefore be affirmed (R. 408).

The court below denied the motion. It stated that the petitioner was really asking it to disregard the ruling of this Court to the effect that the transaction under consideration was not a reorganization for reasons other than those discussed in the *Le Tulle* opinion. The court said that it did not so read the mandate; that to do so would be in effect

to hold that this Court's decision was upon a point of law not necessarily involved in the reversal of its judgment.

ARGUMENT

1. The reorganization question is foreclosed. It was decided by this Court at the last term. The additional reasons which the petitioner now gives for claiming that the transfer was nevertheless a reorganization were presented by him for the first time in his unsuccessful petition for a rehearing in this Court, and was founded upon facts not in the record. The Circuit Court of Appeals clearly had no authority to consider them on remand. *In re Potts,* 166 U. S. 263, 266–267; *Gaines* v. *Rugg,* 148 U. S. 228, 239–240; *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 168.

Moreover, the evidence now offered, to the effect that the petitioner acquired stock of Associated in exchange for stock of General Gas & Electric which he had personally held, was clearly waived, for it was expressly stipulated that no further evidence than that already presented would be offered on the reorganization issue. (R. 154–155.)

While the convertibility of the debentures into stock is clearly indicated in the record (R. 138–139, 330), it was neither mentioned in the Circuit Court of Appeals nor by the petitioner (then respondent) in his brief in opposition.

In this situation, we submit that neither point is now available. Cf. *Helvering* v. *Wood,* 309 U. S. 344, decided February 26, 1940.

In any event, even under petitioner's newly stated facts there is no basis for a different result on the merits. Petitioner's acquisition of Associated stock in exchange for General Gas & Electric stock is of no more consequence than if petitioner had acquired it by purchase. The question here is whether petitioner's investment in the Barstow stock has been terminated or in effect preserved by exchange for Associated stock. The answer to that question depends upon what petitioner received in exchange for the Barstow stock; any independent acquisition of Associated stock in any other manner is beside the point.

2. So far as concerns the option to convert the debentures into stock of Associated, petitioner acquired no interest in Associated corporate business until such option was exercised. The option was, however, not exercisable in the taxable year but only after March 1, 1930 (R. 330), and in fact was never exercised.

3. The issue of the valuation of the securities assumes that there was no reorganization and is presented by the petitioner for the first time in his present petition.[2] It was in fact waived, for the

[2] It is to be noted, however, that Buchsbaum made this contention (for the first time) in his motion in the court below after remand, although he had adverted to the fact that the sale of the debentures was restricted in his petition for a rehearing in No. 538, *supra*, p. 16, but only in order to show that he was compelled to retain a "stake" in the enterprise to the point of seeing his investment dwindle as a result of the 1929 crash.

issues were limited by stipulation (R. 156–157) and the Board understood that there was no dispute with respect to valuation (R. 35).

Moreover, the record clearly shows that petitioner elected to take the debentures in lieu of cash (R. 149–172). The restriction upon the sale involved no sacrifice upon his part and did not introduce any element which made the debentures less valuable to him. His purpose in taking them instead of the cash that was offered to him was to give color to his contention that the transaction was a reorganization and not a sale, in order to enable him to avoid the tax. (R. 32.) This purpose would have been nullified if he had made an immediate sale. It is incongruous for one who deliberately chooses debentures in lieu of cash to contend that they are not precise equivalents, and for one who has compelling reasons for holding them to complain of a restriction upon their sale. *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, expressly turned upon the peculiar circumstances of the case and the highly speculative quality of the stock of an oil company (p. 499). We submit that if the point were available, petitioner could not bring his case within the ruling.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, Jr.,
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SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

JULY, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940